A **AHMAD AZHARI AHMAD ZAINI v. PP & OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
LINTON ALBERT JCA
TENGKU MAIMUN JCA
ZAKARIA SAM JCA
B [CRIMINAL APPEALS NO: W-05-227-09-2013, W-05-228-09-2013 & W-05-233-09-2013]
14 NOVEMBER 2014

C ***CRIMINAL PROCEDURE:*** *Appeal – Conviction and sentence – Accused persons convicted for offence of trafficking in dangerous drugs – Sentenced to death – Whether accused person had knowledge of drugs – Whether defence probable – Whether prima facie case of trafficking proven – Whether trial judge appreciated defence – Whether trial judge ruled on whether presumption of trafficking rebutted – Dangerous Drugs Act 1952, ss. 37(da) & 39B(2)*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal by prosecution – Accused persons charged for trafficking in dangerous drugs – Drugs found in car boot and special compartment of car – First accused faced with second charge of trafficking in drugs found in special compartment of car – First accused acquitted and discharged of second charge – Whether charge against first accused proven beyond reasonable* E *doubt*

Acting on information received that a certain drug transaction would take place, SP9 and a team of police officers tailed a Peugeot driven by the second appellant. Upon reaching the entrance of a condominium, a Mercedes driven by the first appellant arrived shortly. The appellants went into the F condominium block and later entered the Peugeot and headed to a restaurant. At the restaurant, the first appellant met with SP14 who said that he wanted to purchase RM100 worth of cannabis from the first appellant. The appellants then drove back to the condominium and went to the boot of the Mercedes, taking out one bag each. At this point, the raiding team sprung G into action and arrested the appellants. 70 slabs of cannabis were recovered in the two bags while 76 slabs of cannabis were further found in a special compartment in the Mercedes. The appellants were charged in the High Court for trafficking in 67,202g of cannabis, an offence under s. 39B(2) of the Dangerous Drugs Act 1952 ('DDA') ('the first charge'). The first H appellant faced another charge, namely for trafficking in 68,270g of cannabis found in a special compartment of the Mercedes ('the second charge'). The appellants denied any knowledge of the cannabis and argued that before they were arrested at the boot of the Mercedes, they were looking for a car-jack as the car of second appellant's friend ('SD9') had a flat tyre. The first I appellant was acquitted and discharged for the second charge but both the appellants were convicted for the first charge and sentenced to death. The appellants appealed against the conviction and sentence of the first charge and submitted that (i) based on the evidence adduced by the prosecution, there was no *prima facie* case of trafficking; (ii) the trial judge failed to appreciate

the defence; and (iii) the trial judge failed to rule whether the presumption of trafficking under s. 37(da) of the Act had been rebutted. The prosecution appealed against the acquittal and discharge of the first appellant on the second charge.

Held (allowing appeals by appellants and dismissing appeal by prosecution; discharging and acquitting appellants)
Per Tengku Maimun JCA delivering the judgment of the court:

(1) On the first charge, apart from the fact that immediately prior to the arrests, the first appellant was seen driving the Mercedes with the second appellant as the passenger and the fact that both of them later went to the boot of the Mercedes, there was no other evidence or circumstances from which knowledge of the drugs in the boot of the Mercedes would be inferred against the appellants. The mere fact that the appellants were in the Mercedes was insufficient to prove knowledge, custody and control and to constitute possession of the drugs. Furthermore, momentary driving could not be equated with having possession of the drugs. (paras 24, 26 & 35)

(2) There was no concrete evidence that the appellants were holding bags containing the drugs and that both the appellants were trying to avoid arrests or were running away from the police. The conduct of the appellants was not an unequivocal act which was capable of only one interpretation; the guilty minds of the appellants. The conduct could also be a manifestation of common instinct of self preservation. (para 29)

(3) The evidence revealed that the second appellant was not involved in the conversation between SP14 and the first appellant at the restaurant. The submission that both the appellants were discussing the supply of cannabis with SP14 was without merit. Mere presence without more will not be sufficient to fasten liability of the second appellant under s. 34 of the Penal Code. There must be some facts and circumstances from which an inference could be drawn on the meeting of the minds or the pre-arranged plan between the appellants to traffic in dangerous drugs, which in this case, there was none. (para 31)

(4) The trial judge had failed to consider the evidence of the defence witnesses. The evidence of SD9 was most material to support the defence version on the car jack and the explanation on why the appellants were at the boot of the Mercedes when they were arrested. The explanation on the car jack was not inherently improbable and in failing to consider all the evidence and in particular the evidence of SD9, the appellants had been seriously prejudiced in that the defence had not been given a fair and just assessment. (paras 36 & 37)

(5) The trial judge had found that the appellants had actual possession of the drugs and had invoked s. 37(da) of the Act to find trafficking against the appellants. Having heard the defence, the trial judge had however failed to make a ruling on whether the appellants had rebutted the presumption of trafficking. (para 44)

(6) The prosecution had failed to prove the charges against the appellants beyond reasonable doubt as (i) it was not proven that the appellants were the owner of the Mercedes; (ii) there was no evidence as to how long the first appellant had been driving the Mercedes; (iii) no evidence was adduced as to who had access to the Mercedes prior to the arrest of the appellants; and (iv) that there was physical contact between both the appellants and the two bags containing the cannabis in the boot of the Mercedes. (para 43)

Bahasa Malaysia *Translation of Headnotes*

Bertindak atas maklumat bahawa satu transaksi dadah akan berlaku, SP9 dan sepasukan pegawai polis mengekori sebuah Peugeot yang dipandu oleh perayu kedua. Setibanya di pintu masuk sebuah kondominium, sebuah Mercedes yang dipandu oleh perayu pertama tiba sejurus kemudian. Perayu-perayu masuk ke blok kondominium tersebut dan kemudian menaiki Peugeut dan menuju ke sebuah restoran. Di restoran tersebut, perayu pertama bertemu dengan SP14 yang mengatakan bahawa dia ingin membeli kanabis bernilai RM100 daripada perayu pertama. Perayu-perayu memandu kembali ke kondominium selepas itu dan ke but Mercedes, masing-masing mengambil satu beg. Ketika ini, pasukan serbuan mula bertindak dan menangkap perayu-perayu. 70 mampatan kanabis dijumpai dalam dua beg tersebut manakala 76 mampatan kanabis lagi dijumpai dalam ruang rahsia di dalam Mercedes. Perayu-perayu dituduh di Mahkamah Tinggi kerana mengedar 67,202g kanabis, satu kesalahan di bawah s. 39B(2) Akta Dadah Berbahaya 1952 ('ADB') ('pertuduhan pertama'). Perayu pertama menghadapi satu lagi pertuduhan, iaitu mengedar 68,270g kanabis yang dijumpai dalam ruang rahsia di dalam Mercedes tersebut ('pertuduhan kedua'). Perayu-perayu menafikan sebarang pengetahuan mengenai kanabis tersebut dan menghujahkan bahawa sebelum mereka ditangkap di but Mercedes, mereka sedang mencari jek kereta kerana tayar kereta kawan perayu kedua ('SD9') pancit. Perayu pertama dilepaskan dan dibebaskan daripada pertuduhan kedua tetapi kedua-dua perayu disabitkan atas pertuduhan pertama dan dijatuhkan hukuman mati. Perayu-perayu merayu terhadap sabitan dan hukuman bagi pertuduhan pertama dan menghujahkan bahawa (i) berdasarkan keterangan yang dikemukakan oleh pihak pendakwaan, tiada kes *prima facie* pengedaran; (ii) hakim bicara gagal mempertimbangkan pembelaan; dan (iii) bahawa hakim bicara gagal memutuskan sama ada anggapan pengedaran di bawah s. 37(da) Akta telah disangkal. Pihak pendakwaan merayu terhadap pelepasan dan pembebasan perayu pertama bagi pertuduhan kedua.

Diputuskan (membenarkan rayuan-rayuan oleh perayu-perayu dan menolak rayuan oleh pihak pendakwaan; melepaskan dan membebaskan perayu-perayu)

Oleh Tengku Maimun HMR menyampaikan penghakiman mahkamah:

(1) Bagi pertuduhan pertama, selain daripada fakta bahawa sejurus sebelum tangkapan-tangkapan, perayu pertama dilihat memandu Mercedes dengan perayu kedua sebagai penumpang dan fakta bahawa kedua-dua mereka kemudiannya ke but Mercedes tersebut, tiada keterangan atau hal-hal keadaan lain yang daripada mana pengetahuan mengenai dadah-dadah dalam but Mercedes tersebut boleh disimpulkan terhadap perayu-perayu. Sekadar fakta bahawa perayu-perayu berada dalam Mercedes tersebut tidak cukup untuk membuktikan pengetahuan, jagaan dan kawalan dan untuk membentuk milikan dadah-dadah. Tambahan lagi, pemanduan seketika tidak boleh disamakan dengan milikan dadah-dadah tersebut.

(2) Tiada bukti kukuh bahawa perayu-perayu sedang memegang beg-beg berisi dadah-dadah tersebut dan bahawa perayu-perayu cuba mengelak daripada ditangkap atau cuba melarikan diri daripada pihak polis. Perlakuan perayu-perayu bukanlah perlakuan tidak bercanggah yang hanya boleh ditafsirkan dengan satu tafsiran; minda-minda bersalah perayu-perayu. Perlakuan tersebut juga mungkin boleh menjadi satu manifestasi naluri biasa pemeliharaan diri.

(3) Keterangan mendedahkan bahawa perayu kedua tidak terlibat dalam perbualan SP14 dengan perayu pertama di restoran. Hujahan bahawa kedua-dua perayu berbincang mengenai bekalan kanabis dengan SP14 tidak bermerit. Kehadiran semata-mata tanpa lebih daripada itu tidak cukup untuk mengenakan liabiliti atas perayu kedua di bawah s. 34 Kanun Keseksaan. Mesti terdapat secebis fakta dan hal keadaan daripada mana boleh disimpulkan mengenai pertemuan minda atau rancangan yang telah diatur lebih awal antara perayu-perayu untuk mengedar dadah-dadah berbahaya, yang dalam kes ini, tidak wujud sama sekali.

(4) Hakim bicara gagal mempertimbangkan keterangan saksi-saksi pembelaan. Keterangan SD9 adalah paling material untuk menyokong versi pembelaan mengenai jek kereta dan penjelasan mengenai kenapa perayu-perayu berada di but Mercedes tersebut semasa mereka ditangkap. Penjelasan mengenai jek kereta bukanlah mustahil dan dalam gagal untuk mempertimbangkan kesemua keterangan dan khasnya, keterangan SD9, perayu-perayu telah diprejudiskan secara serius dalam mana pembelaan tidak diberikan penilaian yang adil dan saksama.

(5) Hakim bicara telah mendapati bahawa perayu-perayu mempunyai milikan dadah-dadah dan telah membangkitkan s. 37(da) Akta untuk memutuskan pengedaran terhadap perayu-perayu. Selepas mendengar

pembelaan, hakim bicara telah, walau bagaimanapun, gagal untuk memutuskan mengenai sama ada perayu-perayu telah menyangkal anggapan pengedaran.

(6) Pihak pendakwaan telah gagal membuktikan pertuduhan-pertuduhan terhadap perayu-perayu melampaui keraguan munasabah kerana (i) tidak dibuktikan bahawa perayu-perayu merupakan pemilik Mercedes; (ii) tidak terdapat keterangan mengenai berapa lama perayu pertama telah memandu Mercedes tersebut; (iii) tiada keterangan yang dikemukakan mengenai siapa yang mempunyai akses kepada Mercedes tersebut sebelum tangkapan perayu-perayu; dan (iv) tiada sentuhan fizikal antara kedua-dua perayu dengan kedua-dua beg yang mengandungi kanabis dalam but Mercedes tersebut.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
Ibrahim Mohamad & Anor v. PP [2011] 4 CLJ 113 FC ***(refd)***
Krishna Rao Gurumurthi v. PP and Another Appeal [2009] 2 CLJ 603 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
State of Orissa v. Raghuram Sahu & Ors [1979] CriLJ 502 ***(refd)***
Victor Chidiebere Nzomiwu & Ors v. PP [2012] 1 LNS 806 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 182A
Dangerous Drugs Act 1952, ss. 2, 37(da), 39B(2)
Evidence Act 1950, s. 27
Penal Code, s. 34

(Criminal Appeals No: W-05-227-09-2013 & W-05-228-09-2013)
For the appellants - Hisyam Teh Poh Teik (Amer Hamzah Arshad with him); M/s Nizam Amer & Sharizad
For the respondent - Asmah Musa; DPP

(Criminal Appeal No: W-05-233-09-2013)
For the appellant - Asmah Musa; DPP
For the respondent - Hisyam Teh Poh Teik (Amer Hamzah Arshad with him); M/s Nizam Amer & Sharizad

[Appeal from High Court, Kuala Lumpur; Criminal Trials No: MTJ(2)45-73-2010 & 45-75-2010]

Reported by Najib Tamby

JUDGMENT

Tengku Maimun JCA:

[1] The appellant in Appeal No. W-05-227-09-2013 and the appellant in Appeal No. W-05-228-09-2013 were the first accused and the second accused respectively in the High Court. In this grounds of judgment, they will be referred to as the first appellant and the second appellant respectively.

[2] The first and the second appellants were charged for trafficking in dangerous drugs, to wit 67,202g of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act), read together with s. 34 of the Penal Code (the first charge). The drugs forming the subject matter of the first charge were found in the boot of Mercedes Benz registration No. PBW 9127 ("the Mercedes").

[3] The first appellant faced another charge, ie, for trafficking in 68,270g of cannabis (the second charge). The second charge relates to the cannabis found in the special compartment of the Mercedes.

[4] The appellants were convicted and sentenced to death on the first charge. For the second charge, the first appellant was acquitted and discharged. The appellants appealed against the conviction and sentence on the first charge, while the prosecution appealed against the acquittal and discharge of the first appellant on the second charge. Hence the three appeals before us.

[5] We heard the three appeals together at the end of which we allowed the appeals by the appellants against the conviction and sentence and we dismissed the appeal by the prosecution. We now give our reasons.

The Prosecution's Case

[6] Briefly, the prosecution's case is as follows. Acting on information received, on 4 June 2010, SP9 and his men had tailed a Peugeot driven by the second appellant from Plaza Tol Jalan Duta to the entrance of Danau Impian Condominium ("the condominium"). The Peugeot stopped at the roadside in front of the entrance of the condominium and shortly, a Mercedes driven by the first appellant arrived. The second appellant got into the Mercedes. The Mercedes entered the said condominium where it was parked at the parking lot marked as 448. SP9 and his men followed the Mercedes to the parking lot.

[7] Both the appellants alighted from the Mercedes and went into the said condominium block. At about 8pm, both the appellants were seen walking out from the said condominium block, heading towards the Peugeot which was parked by the roadside to the main entrance of the condominium. Both the appellants entered the Peugeot and drove away. The police team followed the Peugeot to Restoran Suraya ("the restaurant").

[8] At the restaurant, the first appellant met SP14. SP14 said that he wanted to purchase RM100 worth of cannabis from the first appellant. Thereafter, both the appellants got into a Kelisa which was earlier driven by SP14 while SP14 went inside the Peugeot.

[9] The second appellant then drove Kelisa with the first appellant as the passenger, back to the said condominium. At the condominium, the appellants came out of Kelisa and went to the boot of the Mercedes. The boot was opened. The appellants were taking out one bag each from the boot of

the Mercedes. At that point of time, the raiding parties arrived. Both the appellants were arrested. 70 slabs of cannabis were recovered in two bags from the boot of the Mercedes. The chemist ("SP3") confirmed that the cannabis weigh 67,202g.

[10] On 5 June 2010, after interrogating the first appellant, the police found 76 slabs in a special compartment in the Mercedes, which was confirmed by SP3 to be 68,270g of cannabis.

[11] At the end of the prosecution case, the learned trial judge made the following finding in respect of the first charge:

> 13. Fakta-fakta di dalam kes ini adalah jelas bahawa kedua-dua T telah didapati pada malam kejadian telah berada di belakang boot kereta MB, PBW 9127, membuka boot kereta tersebut, dan telah memegang kedua-dua beg plastik besar eksibit P21 dan P52 yang berisi satu jumlah dadah cannabis yang banyak. Kedua-dua mereka telah cuba mengangkat beg-beg tersebut sebelum diserbu oleh pasukan SP9 dan perbuatan berkenaan jelas sekali termasuk di bawah tafsiran "trafficking" di bawah seksyen 2 ADB 1952. (Rujuk kepada kes *Chan Pean Leon v. PP* di atas).
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> 14. ...
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> 15. Samada kedua-dua T mempunyai pengetahuan berkenaan dengan dadah berkenaan pada malam itu? Sepertimana diputuskan di dalam banyak kes, elemen pengetahuan T boleh dibuktikan daripada kelakuan dan tindakan kedua-dua mereka sebelum dapat ditangkap. Pepatah Melayu mengatakan "berani kerana benar dan takut kerana salah". Kedua-dua mereka cuba melarikan diri apabila mendengar jeritan "polis"? Walaupun peguambela ada menghujahkan bahawa perbuatan mereka melarikan diri itu bukan disebabkan mereka tahu berkenaan dadah itu, akan tetapi oleh kerana mereka diacukan dengan pistol. Sebagai orang yang munasabah, seseorang itu tidak akan melarikan diri sekiranya diacukan dengan pistol, kerana pistol bukanlah senjata seperti parang ataupun pisau, peluru pistol boleh mengenai sasaran walaupun di dalam jarak 50 meter atau lebih.
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> 16. Maka jelas perbuatan kedua-dua T ini adalah tidak munasabah, jelas perbuatan tersebut menunjukkan mereka tahu bahawa mereka sedang berurusan dengan barangan salah iaitu dadah berbahaya. Rujuk kepada kes *Parlan Dadeh v. PP* [2009] 1 CLJ 717 dan *Reza Mohd Shah Ahmad Shah v. PP* [2005] 4 CLJ, *PP v. Mohd Farid bin Mohd Sukis and Anor* [2003] 3 MLJ 401, *Tarmizi Yaacob & Anor v. PP and Anor. Appeal* [2010] 8 CLJ 501.
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> 17. ...
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> 18. Oleh itu, saya menerima keterangan saksi-saksi pendakwaan berkenaan dengan elemen kawalan, pemilikan dan pengetahuan ini tanpa diragui. ...
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> 19. ...

20. Elemen seterusnya ialah samada kedua-dua T berniat untik mengedar dadah tersebut? Daripada jumlah dadah yang dijumpai di dalam boot kereta eksibit P190, jelas menunjukkan bahawa dadah itu bukanlah untuk "personal consumption", oleh kerana ia terlalu banyak untuk itu. Maka saya bersetuju dengan pihak pendakwaan untuk mengguna pakai anggapan di bawah seksyen 37(da)(vi) ADB 1952. Saya merujuk kepada kes *Ong Ah Chuan v. PP* (di atas) dan *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129.

21. Seterusnya samada wujud niat bersama kedua-dua T untuk mengedar dadah berkenaan? Di dalam kes ini, keterangan-keterangan yang kredibel menunjukkan peranan kedua-dua T. T2 tidak boleh dikatakan hanya mengikut T1 ke mana sahaja. Perbuatan beliau memegang salah satu daripada Eksibit P21 dan P52 itu sudah mencukupi bagi menunjukkan beliau turut bekerjasama dengan T1 untuk mengedar dadah berkenaan. Seterusnya T2 telah turut berada bersama-sama dengan T1 untuk berbincang berkenaan pembelian dadah dengan SP14. Sekiranya beliau tiada mempunyai niat yang sama dengan T1, beliau perlu meninggalkan urusan itu dilakukan oleh T1 sahaja.

22. Melalui prinsip di dalam kes *Mahbub Shah*, AIR [1945] PC 118, Supr Ct. India, jelas menunjukkan perbuatan kedua-dua T tersebut adalah bertujuan yang sama dengan niat yang sama iaitu untuk mengedar dadah tersebut. ... .

[12] As for the second charge, at para. 24 of the grounds of judgment, the learned trial judge said:

(a) ... fakta-fakta lain seperti T1 mempunyai kunci kepada kereta tersebut dilihat memandu kereta tersebut dan membuka boot kereta tersebut telah menunjukkan bahawa T1 mempunyai kawalan yang "exclusive" ke atas kereta berkenaan.

(b) ... saya berpendapat kenyataan beramaran T1 di bawah seksyen 37A ADB adalah boleh diterima pakai sebagai keterangan.

(c) Sama ada T1 mempunyai pengetahuan kepada dadah di dalam "compartment" tersebut? Berdasarkan kepada keterangan T1 tersebut, saya berpendapat elemen pengetahuan telah dibuktikan, begitu juga saya merujuk kepada fakta pemilikan ke atas kereta berkenaan yang perlu dijelaskan oleh T1.

[13] Having found that the prosecution had made out a *prima facie* case, the learned trial judge called upon the appellants to enter their defence.

The Defence

[14] The defence as summarised by learned counsel for the appellants was as follows:

(i) Both the appellants had no knowledge of the presence of the two bags of cannabis in the boot of the Mercedes;

(ii) Both gave an explanation why they were at the boot of the Mercedes before they were arrested, the explanation being that they were looking for a car-jack as Syed Omar, a friend of the second appellant had a flat tyre and wanted to borrow a car-jack;

(iii) The first appellant said that at the material time he worked for his brother (SD8) as his personal assistant and on the said day he borrowed his brother's car, a Peugeot to go to his rented room at the said condominium. The first appellant had rented a room from one Azhar bin Abd Razak (Azhar). In the said condominium, Azhar stayed with his wife and another tenant, Hakimi, the registered owner of the Mercedes;

(iv) The first appellant said that he went down to Kuala Lumpur to attend the engagement ceremony of the second appellant's sister which was to be held on 6 June 2010;

(v) At about 2pm on 4 June 2010, the first appellant had proceeded to the Hentian Putra station to fetch the second appellant who had just arrived from Pahang by bus. The second appellant wanted to go to Sg. Buloh and had asked the first appellant to send him. The first appellant was tired and could not send the second appellant. He lent the Peugeot to the second appellant after he had returned to the condominium;

(vi) At about 6pm, Azhar requested the first appellant to send him to Old Town White Coffee at Old Klang Road. The first appellant told Azhar that his Peugeot had been borrowed. Azhar told the first appellant to drive the Mercedes instead. Azhar also told the first appellant to leave the Mercedes key and the access card on the table upon his return. The first appellant then sent Azhar in the Mercedes and later the first appellant drove it back. On his way back to the condominium, the second appellant called the first appellant telling him that he had arrived and was waiting for the first appellant outside the condominium. When the first appellant reached the condominium, the second appellant got into the Mercedes. The first appellant drove inside the condominium and parked the Mercedes at lot 448;

(vii) Both the appellants then went up the condominium. At about 8pm, they went out for dinner. They had planned a night out and had invited their respective friends. The first appellant had invited SP14 whilst the second appellant had invited Syed Omar (SD9). They went to the restaurant in the Peugeot. The Peugeot had heating problems. At the restaurant, the first appellant met SP14 who had came in a Kelisa and he was introduced to the second appellant;

(viii) The second appellant then called his friend SD9 and was informed that SD9 had a flat tyre and needed to borrow a car-jack. The second appellant inquired from both the first appellant and SP14 whether he could borrow a car-jack;

(ix) There was no car-jack in either the Kelisa or the Peugeot. The first appellant then suggested that they check the Mercedes. Because the Peugeot had heating problems, they then went in the Kelisa back to the condominium;

(x) On the way back, the first appellant telephoned Azhar asking him whether there was a car-jack in the Mercedes. Azhar told him that there was probably one in the boot of the Mercedes and Azhar further said he would be going out soon but would wait for them at Block A to hand over the key of the Mercedes. The key was then handed over and the Kelisa was parked beside the Mercedes.

(xi) The boot of the Mercedes was opened and the first appellant saw two big bags inside it. The first appellant then called the second appellant to help him to shift the bags. Before the appellants handled the bags to look for the car-jack, they were arrested.

[15] The learned trial judge made the following finding in respect of the defence:

> 55. ... watak utama yang dibangkitkan oleh kedua-dua T, khususnya T1 ialah seorang bernama Azhar, bagaimanapun Azhar telah gagal ditampilkan untuk memberi keterangan samada di dalam kes pendakwaan atau pun kes pembelaan. Walaupun ada usaha untuk memanggil beliau sebagai saksi akan tetapi usaha tersebut tidak berhasil. Melalui keterangan SD3, jelas menunjukkan bahawa terdapat seorang yang bernama Azhar bin Abd. Razak dicatit di dalam "Letter of Offer" untuk menyewa rumah (eksibit D209) bagi unit No. 8, Tingkat 12, Blok 17 (Kondominium Danau Impian).
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> 56. Bagaimanapun apakah kaitan beliau dengan dadah tersebut? Dadah itu tidak dijumpai di dalam rumah berkenaan, tetapi di dalam kereta MB No. Pendaftaran PBW 9127? T1 di dalam keterangannya mengatakan Azhar adalah orang yang mempunyai kawalan dan jagaan yang "exclusive" ke atas kereta MB tersebut. Alasannya ialah Azhar yang memegang kunci kereta tersebut, Azhar telah meminta T1 ini menghantar beliau ke Jalan Kelang Lama dengan kereta MB tersebut, pada hari kejadian (sebelah petang), seterusnya Azhar yang memberikan kunci kepada T1, untuk membuka boot kereta MB sejurus sebelum mereka diserbu oleh SP4 dan pasukannya.
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> 57. Setelah saya meneliti keterangan senyap iaitu kad pendaftaran kereta MB (Eksibit P189) tersebut, tiada terdapat nama Azhar bin Abd. Razak, begitu juga kepada Polisi Insuran bagi kereta tersebut, eksibit P195 tidak menunjukkan terdapatnya nama Azhar bin Abd. Razak di mana-mana. Akan tetapi nama Ahmad Azhari bin Ahmad Zaini pula terdapat pada eksibit P195 sebagai pemandu kereta kedua yang mana T1 menafikan itu adalah nama beliau akan tetapi carian resmi yang dibuat oleh pihak pembelaan di Pejabat Pendaftaran Pusat telah gagal menemui siapakah penama tersebut.

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58. Pada pendapat saya beban untuk membuktikan siapakah Ahmad Azhari bin Ahmad Zaini bukanlah di atas bahu pihak pendakwaan, sebaliknya atas T1 sendiri memandangkan nama tersebut sama dengan nama beliau. Maka kegagalan tersebut membolehkan mahkamah ini membuat inferen yang tidak menyebelahi beliau.

B **[16]** Specifically on the overheating of the Peugeot and the car-jack, the learned trial judge said:

63. Saya berpendapat kedua-dua alasan ini mustahil untuk diterima, memandangkan kerosakan pada kereta Peugeot tersebut bukanlah sesuatu yang serius sehingga tidak boleh berfungsi untuk sampai ke
C Condominium Danau Impian yang hanya akan mengambil masa 15 minit-30 minit sahaja dari situ. Manakala alasan mencari "car jack" adalah tidak munasabah untuk "car jack" kereta MB boleh digunakan kepada kereta "Omar". Kawan T2 yang tidak dinyatakan kereta jenis apa, malah Omar tidak dipanggil untuk mengesahkan fakta ini, walaupun pada mulanya peguambela menyatakan Omar
D akan dipanggil. Adalah mustahil juga untuk mempercayai bahawa 3 buah kereta tidak mempunyai "car jack" iaitu kereta Peugeot, kereta Omar dan kereta SP14, sebaliknya mereka perlu mencari pada kereta MB, di mana "car jack" kereta MB hanya boleh digunapakai untuk kereta jenis MB sahaja.

E **[17]** The learned trial judge went on to consider the conduct of the appellants upon being raided by the police where His Lordship concluded as follows:

64. Pembelaan T1 dan T2 mengakui bahawa mereka telah melarikan diri ketika diserbu, alasan mereka 10 orang telah menyerbu dan
F mengacukan pistol. ...

65. Alasan kedua mereka berlari adalah kerana pihak polis khususnya SP4 dan pasukannya telah tidak memperkenalkan diri terlebih dahulu. ... SP4 secara jelas mengatakan beliau telah memperkenalkan diri sebagai polis, dan semasa hendak menangkap
G juga berlaku pergelutan.

66. Elemen-elemen ini dengan jelas menunjukkan pengetahuan mereka mengenai dadah tersebut dan tindakan mereka yang sedang berurusan dengan dadah-dadah berkenaan, ditambah dengan penemuan wang RM11,300 di dalam "dash board" kereta Kelisa SP14 ia lebih menguatkan lagi keterangan SP14 yang mengatakan
H beliau dan T1 berbincang berkenaan jual beli dadah pada malam itu. Memang benar tiada keterangan bahawa wang tersebut untuk membeli dadah, akan tetapi jika diteliti keterangan SP14 maka satu rumusan atau andaian boleh dibuat ke arah itu. Fakta ini diperkuatkan lagi dengak cara kereta Kelisa tersebut yang diletak secara melintang di belakang kereta MB tersebut.

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67. Keterangan-keterangan ini jelas menunjukkan bahawa kedua-dua T itu mempunyai kawalan, pemilikan dan pengetahuan ke atas dadah di dalam 2 buah beg plastik yang berada di dalam boot kereta MB tersebut. ...

68. Samada T2 mempunyai niat bersama di dalam kes ini bersama-sama dengan T1 untuk mengedar dadah tersebut? Di dalam kes *Ravindran a/l Ramasamy v. PP* [2013] 4 AMR 502, Y.A. Hamid Sultan Abu Bakar JCA berkata: ...

69. Di dalam kes ini terdapat "overwhelming evidence" samada di dalam kes pendakwaan mahupun kes pembelaan yang menunjukkan "criminal act" oleh T2 di dalam mengendalikan dadah berkenaan.

70. ... saya berpuashati bahawa pihak pendakwaan telah berjaya membuktikan suatu kes melampaui keraguan yang munasabah terhadap kedua-dua T. Pembelaan kedua-dua T adalah suatu rekaan dan "afterthought" mereka sahaja dan tidak boleh dipercayai.

[18] Insofar as the second charge against the first appellant is concerned, the learned trial judge found:

73. Setelah meneliti semula keseluruhan kes pendakwaan selepas mendengar pembelaan T saya berpuashati bahawa T berjaya menimbulkan satu keraguan yang munasabah terhadap kes pendakwaan, khususnya apabila pihak pendakwaan gagal untuk memanggil pemilik kereta MB terdahulu bagi menafikan pembabitan beliau dengan "secret compartment" yang terdapat di dalam kereta berkenaan.

74. Maka saya berpendapat adalah tidak selamat untuk bergantung semata-mata kepada eksibit P187 dan saksi-saksi pendakwaan di dalam mensabitkan T1 ini.

[19] In respect of the appeals against conviction and sentence relating to the first charge, learned counsel for the appellants argued on the following three grounds:

(i) That based on the evidence adduced by the prosecution, there was no *prima facie* case of trafficking;

(ii) Failure of the learned trial judge to appreciate the defence; and

(iii) Failure of the learned trial judge to rule whether the presumption of trafficking under s. 37(da) of the Act has been rebutted.

[20] As for the appeal by the prosecution against the acquittal and discharge of the first appellant in respect of the second charge, learned Deputy Public Prosecutor argued that there was evidence of direct possession and because of the weight of the drugs, s. 37(da) of the Act applies. Even without resorting to s. 37(da), learned Deputy Public Prosecutor submitted that s. 2 applies (ie, the act of keeping the drugs in the car) and that the act of trafficking had been made out.

Our Decision

[21] For the first charge against both the appellants, the prosecution relied on the fact that the first appellant was driving the Mercedes; the negotiation between the first appellant and SP14 at the restaurant (allegedly in the

presence of the second appellant) and that both the appellants had gone to the boot of the Mercedes and had taken out the bags, to infer knowledge on the part of the appellants of the drugs found in the boot.

[22] The prosecution had similarly relied on the fact that the Mercedes was being driven by the first appellant and the fact that the first appellant's name appeared as the insured for the Mercedes, to sustain the second charge against the first appellant.

[23] Having considered the submissions and the records of appeal, we found merits in the grounds raised by learned counsel for the appellants.

[24] On the first charge, apart from the fact that immediately prior to the arrests, the first appellant was seen driving the Mercedes with the second appellant as the passenger and the fact that both of them later went to the boot of the Mercedes from the Kelisa, there was no other evidence or circumstances from which knowledge of the drugs in the boot of the Mercedes could be inferred against the appellants.

[25] In *Ibrahim Mohamad & Anor v. PP* [2011] 4 CLJ 113 Zulkefli Makinudin FCJ (as His Lordship then was) said:

> [12] The Supreme Court in *Abdullah Zawawi* had therefore highlighted the danger if relying of a tip-off's case as there is a possibility that in such a situation the drugs may have been planted in order to implicate the accused. Hence the need for the prosecution to exclude the possibilities that other individuals may have access to the drugs in question. We find on a proper perusal of the evidence it would show that the prosecution had failed to excluded the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of the arrest. This is further compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to s. 32(j)(i) of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.
>
> [13] It is our considered view that the failure on the part of the prosecution to call the owner of the vehicle or at the very least to tender his statement pursuant to s. 32(j)(i) of the Evidence Act 1950 raises the question as to who was in actual control of the vehicle immediately prior to the date of arrest. No explanation whatsoever was offered by the prosecution as to what happened to the vehicle from the date when the second accused was summoned in Kulim, Kedah up to the date when the vehicle was stopped at the road block. There is no evidence to indicate for how long both the accused had been in possession of the vehicle.
>
> [14] The mere fact that the second accused was found in the vehicle and that he was previously summoned for driving the vehicle somewhat approximately 6 months prior to the date of arrest are insufficient for the court to make an inference that he had exclusive custody or control over

the vehicle. Even if the learned trial judge was correct in deciding that both the accused were in custody and control of the vehicle when they were stopped by the police party, this could not be translated into having custody and control over the said drugs in the absence of other incriminating evidence against them. It could not have given rise to the inference that the said drugs belonged to them. (See the case of *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285).

[15] The law is well settled that having only custody and control over the said drugs is insufficient to establish "possession". The physical act of custody or control must be accompanied with evidence that the accused had knowledge of the said drugs. In the absence of any statutory presumption, knowledge has to be proved either by direct evidence or circumstantial evidence. Mere knowledge alone without exclusivity of either physical custody or control or both is insufficient in law to constitute possession, let alone trafficking. (See the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17).

[16] In the present case, the learned trial judge made the inference that both the accused had knowledge of the said drugs by relying on their conduct after they were arrested, in particular their act of fleeing from the scene. This was affirmed by the Court of Appeal. On this point we are of the view the trial judge had clearly overlooked the other inferences that could have been made from the act of fleeing or absconding. When there are two or more inferences that could be made the inference most favourable to the accused must be drawn. (See the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457).

[17] Whilst the conduct of the accused fleeing the scene may be a relevant factor to be considered, such a conduct however must be weighed against the circumstances of the case. This is because even an innocent man may be panicky and try to evade arrest when wrongly suspected of committing a crime. It is a common instinct of self-preservation.

[26] In our view, the case of *Ibrahim Mohamad & Anor (supra)* applies to the facts of the present case. The mere fact that the appellants were in the Mercedes was insufficient to prove knowledge, custody and control and to constitute possession of the drugs.

[27] The learned trial judge had stated at para. 21 of the grounds of judgment that "... T2 tidak boleh dikatakan hanya mengikut T1 ke mana sahaja. Perbuatan beliau memegang salah satu daripada eks. P21 dan P52 itu sudah mencukupi bagi menunjukkan beliau turut bekerjasama dengan T1 untuk mengedar dadah berkenaan. Seterusnya T2 telah turut berada bersama-sama dengan T1 untuk berbincang berkenaan pembelian dadah dengan SP14. Sekiranya beliau tiada mempunyai niat yang sama dengan T1, beliau perlu meninggalkan urusan itu dilakukan oleh T1 sahaja.

[28] SP4 had stated that (p. 299: RR Jld 2):

> Pemandu kereta dan penumpang telah keluar, pemandu kereta ialah OKT2. OKT1 telah buka pintu depan (pemandu). Kemudian buka boot. OKT2 berjalan dan menuju ke boot. OKT buka boot. Lepas itu kedua-dua mereka sampai ke belakang kereta. OKT1 telah pegang 1 beg. OKT2 pun angkat 1 beg. Kedua-dua mereka telah angkat beg itu pada masa lebih kurang sama. Sebelum sempat angkat, pasukan serbuan terdiri daripada Team A, B, C, masa itu sampai dan berhenti, bila lihat 2 buah kenderaan itu, kedua-dua mereka lari. Pasukan saya tangkap OKT1, pasukan ASP Bala telah menangkap OKT2.

[29] There was thus no concrete evidence that the appellants were in fact holding the bags containing the drugs and that both the appellants were trying to avoid the arrests or were running away from the police. From the evidence of SP4, only the first appellant resisted arrest (p. 299: RR Jld 2). On conduct, SP4 further testified (p. 343: RR Jld 2): "7 orang telah keluar serentak dengan senjata masing-masing dan mengacukan ke arah kedua-dua orang di kereta tersebut." To a question by learned counsel during cross-examination (p. 345:RR Jld 2) that "perbuatan hendak lari tersebut adalah untuk selamatkan diri, takut apa-apa berlaku pada mereka?" SP4 answered "Ya". In the light of this evidence, we were of the view that conduct of the appellants was not an unequivocal act which was capable of only one interpretation, ie, the guilty minds of the appellants. As stated by the Federal Court in *Ibrahim Mohamad & Anor*, *supra,* the conduct could also be a manifestation of common instinct of self-preservation.

[30] The evidence of SP14 in respect of the first appellant was: "... malam itu, dia telefon saya kata ada bekalan, pada masa itu selepas Maghrib. Dia kata kalau nak dah "ok". OKT1 kata tempat itu, jam saya tak ingat. Tujuan jumpa OKT untuk minum dan ambil ganja, saya ambil dalam RM100". It must be noted from the above evidence of SP14 that there was no issue of negotiation between him and the first appellant on the supply of the drugs when they met at the restaurant. What was apparent was that the purpose of the meeting was for SP14 to take the drugs. It appears therefore that an agreement had been reached for the purchase of RM100 worth of cannabis. And if indeed that was the case, ie, that the first appellant had called SP14 to inform about the ready supply and that SP14 had wanted to take the drugs for RM100, why did the first appellant meet SP14 without the drugs and why the need for the first appellant to come back to the Mercedes for the drugs later as the first appellant could have brought the drugs with him when he mets P14 at the restaurant. The sequence of events in our view supports the defence version that the appellants went back to the condominium in Kelisa because the Peugeot was overheating and they wanted to look for a car jack in the Mercedes.

[31] Further, the evidence of SP14 revealed that the second appellant was not involved in the conversation between SP14 and the first appellant at the restaurant. The conversation was only between the first appellant and SP14.

Given the evidence of SP14, the submission of learned Deputy Public Prosecutor that both the appellants were discussing the supply of cannabis with SP14 is without merit. In any event, mere presence without more will not be sufficient to fasten liability of the second appellant under s. 34 of the Penal Code. There must be some facts and circumstances from which an inference could be drawn on the meeting of minds or the pre-arranged plan between the appellants to traffick in dangerous drugs, which in this case, there was none (see *State of Orissa v. Raghuram Sahu & Ors* [1979] CriLJ 502; *Krishna Rao Gurumurthi v. PP and Another Appeal* [2009] 2 CLJ 603). We also noted the following evidence of SP14 in cross-examination:

S: Sampai di sana restoran tutup?

J: Ya

S: Malam itu tiada apa-apa aktiviti atau transaksi penjualan atau pembelian dadah di tempat itu?

J: Ya.

[32] Learned Deputy Public Prosecutor had submitted thus at para. 11 of p. 15 of the written submission:

> Adalah dihujahkan berdasarkan keterangan SP14, kehadiran SP14 dan perbincangan antaranya dengan P1 dengan dihadiri P2 membuktikan elemen possessi.

[33] As stated above, the evidence of SP14 had negated the involvement of the second appellant during the alleged discussions between SP14 and the first appellant on the supply of the drugs. Be that as it may, the evidence of SP14 was in respect of RM100 worth of cannabis. That conversation for the supply of RM100 of cannabis, if at all it had taken place, did not, in our view, prove the possession by the appellants of 67,202g and 68,270g of cannabis in the boot and in the special compartment of the Mercedes respectively.

[34] SP14 had stated that (p. 359:RR Jld 2) "Saya tidak tahu OKT1 dan OKT2 tinggal di mana, sebab dia datang ke Kuala Lumpur.". SP14 confirmed in cross-examination that the Mercedes came from outside the condominium which is consistent with the evidence of the first appellant that he was coming back from sending Azhar to the Old Town White Coffee at Jalan Klang Lama.

[35] The evidence of the first appellant fits into the prosecution's version that they were seen driving outside the said condominium (p. 497: rekod rayuan Jld 2). The first appellant had given an account of the circumstances that led him to driving the Mercedes. We agree with learned counsel that the momentary driving cannot be equated with having possession of the drugs (see *Public Prosecutor v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285; [1992] 2 MLJ 561).

[36] In concluding that the prosecution had proved its case beyond reasonable doubt, the learned trial judge at para. 70 of the grounds of judgment stated that "Pembelaan kedua-dua T adalah suatu rekaan dan "afterthought" mereka sahaja dan tidak boleh dipercayai." In this regard, we found that the learned trial judge had failed to consider the evidence of the defence witnesses, especially the aspects of the evidence which had explained why the appellants were in the Mercedes and more importantly, the evidence of SD9 on his request for the car jack. The defence version on the overheating of the Peugeot and the car jack was put to the material prosecution witness ie, SP14, who had been asked by the first appellant to wait inside the Peugeot while the appellants went back to the condominium with the Kelisa to look for a car jack in the Mercedes. The evidence of Syed Omar, SD9 was most material to support the defence version on the car jack and the explanation on why the appellants were at the boot of the Mercedes when they were arrested. SD9 was consistent in his evidence. In examination-in-chief he said "Lebih kurang jam 8.00 malam saya keluar tapi dalam perjalanan itu, saya tersangkut, tayar pancit, masa itu OKT2 contact saya, saya cakap minta dia cari jack sebab jack saya rosak". In cross-examination he testified that "Kereta saya pancit di Jalan Kelang Lama, tayar belakang kena paku, car jack saya rosak. Saya jarang pakai, sebab dia berkarat. ... Saya ada kawan lain, tapi sebab saya plan nak jumpa dia, maka saya minta dia bawa car jack. Dia suruh tunggu 1/2 jam."

[37] As provided for in s. 182A of the Criminal Procedure Code, the duty lies on the learned trial judge to consider all the evidence which includes the defence, however weak or unreasonable the defence may be (see *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705; *Ganapathy Rengasamy v. Public Prosecutor* [1998] 2 CLJ 1; [1998] 2 MLJ 577). In the instant case, not only did the learned trial judge fail to consider the defence, His Lordship had made an error of fact in stating that the defence had failed to call Syed Omar. In our view, the explanation on the car jack is not inherently improbable and in failing to consider all the evidence and in particular the evidence of SD9, the appellants had been seriously prejudiced in that the defence had not been given a fair and just assessment. The failure of the learned trial judge to consider the defence is a serious misdirection, warranting appellate intervention (see *Gooi Loo Seng v. Public Prosecutor* [1993] 3 CLJ 1; [1993] 2 MLJ 137).

[38] In respect of the second charge against the first appellant, the drugs were purportedly discovered pursuant to the information or statement given by the first appellant. Learned Deputy Public Prosecutor submitted that there was direct evidence of possession of the drugs in the special compartment of the Mercedes. It was the submission of learned Deputy Public Prosecutor that given the special compartment, the same type and the large amount of drugs, who could have put it there but the first appellant. The learned trial judge found that the statement given by the first appellant

was a statement leading to discovery, as before the statement was given by the first appellant, SP14 had no knowledge of the drugs found in the special compartment of the Mercedes. Having heard the defence however, His Lordship found that it was not safe to convict the first appellant based on the statement given by the first appellant purportedly leading to the discovery of the drugs in the special compartment of the Mercedes.

[39] The evidence of SP14 who was present at the car park categorically stated that he saw the use of canine to detect the drugs in the special compartment of the Mercedes. We find that the drugs in the special compartment was not discovered pursuant to the information leading to discovery under s. 27 of the Evidence Act 1950 but rather it was recovered by the police with the use of the canine (see pp. 436, 440: rekod rayuan Jld 2).

[40] Apart from the above, there was the issue of access to the car by others. The first appellant had rented a room from Azhar bin Abdul Razak. SD3, the real estate agent confirmed that the said unit of the condominium was rented out to Azhar. SD6, from Mun Hin Motor Sdn Bhd confirmed that he sold the Mercedes to Hakimi bin Saad. He further said that (p. 613: rekod rayuan Jld 2) "Pembeli kereta itu ialah satu lelaki dan 1 perempuan, ada 4 orang datang, semuanya 2 lagi lelaki". When asked whether the two appellants were ever with Hakimi to view the car, SD6 answered in the negative.

[41] The investigating officer ("SP15") did not investigate and did not know who or how many people had access to the Mercedes prior to the first appellant being seen driving the car on 4 June 2010 at about 7.30pm (see p. 451:RR Jld 2). Nevertheless it cannot be denied that both Hakimi and Azhar had access to the Mercedes. Hakimi could not be called to testify. He died on 31 May 2010. Efforts were made by the defence to call Azhar as a witness, but Azhar could not be traced. SP15 admitted that there were no personal belongings of both the appellants in the Mercedes Benz which supports the evidence of the first appellant that he was in the car momentarily.

[42] We were mindful of the fact that besides the name of Hakimi bin Saad as the insured for the use of the Mercedes, the name of Ahmad Azhari bin Ahmad Zaini (with no other particulars, for example the identity card number) appears on the confirmation of purchase of insurance as the other named driver. However in our view, the name *per se* is not sufficient to prove that the first appellant had possession of the drugs found in the Mercedes.

[43] Viewed in the light of the following facts, namely that the appellants were not the owner of the Mercedes; that there was no evidence for how long the first appellant had been driving the Mercedes; that no evidence was adduced as to who had access to the Mercedes prior to the arrest of the appellants; that there was no physical contact between both the appellants

and the two bags containing the cannabis in the boot of the Mercedes (given the evidence of SP4 that the police team had raided the appellants before they could lift the bags); and in the light of the defence, we were of the view that the prosecution had failed to prove the charges against the appellants beyond reasonable doubt.

[44] The learned trial judge had found that the appellants had actual possession of the drugs and had invoked s. 37(da) of the Act to find trafficking against the appellants. Having heard the defence, the learned trial judge however had failed to make a ruling on whether the appellants had rebutted the presumption of trafficking. This is yet another misdirection warranting appellate intervention (see *Alcontara Ambross Anthony v. Public Prosecutor, supra*; *Victor Chidiebere Nzomiwu & Ors v. PP* [2012] 1 LNS 806; [2013] 2 MLJ 690).

[45] In light of all the above, we were of the view that the convictions of the appellants were not safe. We therefore unanimously allowed the appeals of both the appellants and dismissed the appeal of the prosecution. The appellants were acquitted and discharged.